Crl.A. 291/2003
BEFORE
HON'BLE MR JUSTICE P.G.AGARWAL

Heard Mr.T.J.Mahanta, learned counsel for the appellant and Mr.P.C.Gayan , learned P.P., Assam.

This appeal is directed against the judgment and order dated 08.08.03 passed by the learned Sessions Judge, Sonitpur (Tezpur) in Sessions Case No.124/01 convicting the accused appellant under Section 376 IPC and sentencing him to undergo imprisonment for 3 years and to pay fine of Rs.1000/-, in default in payment of fine, to undergo further imprisonment for another three months. Hence, the present appeal.

The accused-appellant Ashok Chetri, a school teacher, has been convicted for the offence under Section 376 IPC on the chrarge that on 29.06.99 the accused entered into the house of his neighbour Rudra Prasad Sarmah and finding his teen aged daughter alone in the house, he committed rape on her. Parents of the victim had gone out for work and other minor brothers and sister of the victim were playing outside, when the accused came in a bi-cycle and called her on the pretext of asking for lime and when came up with lime, at once the accused entered into the room and bolted the door from inside and committed rape and after the incident left the place. The victim repoted the matter to neighbours and when her parents came, she reported the incident to them. The girl was taken to the police Station and on the same night the FIR was lodged and the victim was examined by the Doctor.

Prosecution examined as many as five weitness including the Doctor. The learned trial Court relying on the statement of the victim and other witnesses convicted the accused under Section 376 IPC and sentenced as aforesaid.

We have perused the statement of the alleged victim and find that this has been supported by her teen aged brother Toya Prasad Sarmah (PW-6), who also saw the above incident. He has deposed about the coming of the accused and blotting of the door from inside. This witness claims to have seen the incident by peeping through the door-hole. PW-4 Smti Manju Sarmah is the mother of the victim, who was immediately reported about the incident by the victim (PW-3) wherein the name of the accused appellant was also mentioned. So far the age of the girl is concerned, it is not disputed that she was a minor at the relevant point of time and was a student of primary school.

Learned Counsel for the appellant, however, submitted that in the instant case charges were framed against the accused under Section 376 read with Section 511 IPC, but on conclusion of trial the conviction was passed under Section 376 IPC only and not under Section 448 IPC. Learned counsel further submits that the medical evidence on record does not support the prosecution allegation of rape.

PW-1 Dr. Amal Saikia, who examined the victim girl on the night of the incident itself, did not find any sign of rape or mark of violance on her body. It is, therefore, submitted that as the medical report does not support the prosecution case, this is not a case of rape and hence at best it may be a case of molestation or attempt to outrage modesty. Although, the medical evidence is not must for conviction under Section 376 IPC, we find that in the instant case as the teen aged girl was examined by the Doctor soon after the incident and there was no delay, still the Doctor did not find any mark of violance or sign of rape. Learned counsel has also drawn our attention to the observation of the Apex Court as regards rape or attempt to commit rape made in the case of Koppula Venkat Rao vs. State of Andhra Pradesh, (2004) 3 SCC 602 and in the case of Aman Kumar vs. State of Haryana (2004) 4 SCC 379. In the case of Aman Kumar, the Apex Court made distinction between attempt to commit rape and incident of assault, as below:-

\11. In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired gratify his passions upon her person, but that he

> intended to do so at all events, and notwithstanding any resistenace on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to ratify his passion at all events, and in spite of all resistence, materials must exist. Surrounding circumstances many time throw beacon light on that aspect.\

Now, coming to the present case, we find that the statement of the prose cutrix that she was penitrated is not supported by medical evidence on record re garding penitration, which is a sine qua non in a offence of rape. Considering t he materials, we hold that the benefit must go to the accused.Under the facts an d circumstances, we, however do not find it to be a case of rape under Section 3 76 IPC and rather a case of attempt to commit rape punishable under Section 376/ 511 IPC.

We have heard learned counsel for both sides as regards sentence, we sen tence the accused appellant to undergo rigorous imprisonment for 2(two) years an d to pay fine of Rs.2000/-, in default in payment of fine, to undergo further im prisonment for one month.

The accused appellant is on bail. Send down the records to the learned S essions Judge, Sonitpur, who shall take the accused appellant into custody to se rve out the sentence.